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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 52

MYRON WIENER, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Claims (R. 13) is reported in 136 C. Cls. 827, 142 Fed. Supp. 910.

JURISDICTION

The judgment of the United States Court of Claims dismissing the petitioner's complaint was entered on July 12, 1956 (R. 13) and amended on October 2, 1956 by allowing the respondent judgment on its counterclaim (R. 28).[1] On

[1] On January 7, 1957, the Court of Claims vacated and withdrew the judgment on the counterclaim and separated the issues involved therein from the issues before this court.

October 3, 1956, by order of the Chief Justice (R. 29), the petitioner's time for filing a petition for writ of certiorari was extended to December 8, 1956. The petition for writ of certiorari was filed on December 8, 1956 and was granted on January 21, 1957 (R. 30), 77 S. Ct. 382. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTION PRESENTED

Does the President have the power to remove at his pleasure, before the expiration of his term, an officer of a quasi-legislative and quasi-judicial commission, where the statute creating the commission does not enumerate any causes for removal?

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I, Section 1.—All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

ARTICLE I, Section 8.—* * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

ARTICLE II, Section 1.—The executive Power shall be vested in a President of the United States of America * * *.

ARTICLE II, Section 2.—* * * and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. * * *

ARTICLE II, Section 3.—* * * he shall take care that the Law be faithfully executed * * *.

STATUTES INVOLVED

The War Claims Act of 1948, as amended (62 Stat. 1240, 50 U.S.C. App. 2001-2006), (hereafter referred to as the Act), provides in part:

"Sec. 2(a). There is hereby established a commission to be known as the War Claims Commission (hereinafter referred to as the "Commission") and to be composed of three persons to be appointed by the President, by and with the advice and consent of the Senate. At least two of the members of the Commission shall be persons who have been admitted to the bar of the highest court of any State, territory, or the District of Columbia. The members of the Commission shall receive compensation at the rate of $12,000 a year. The terms of office of members of the Commission shall expire at the time fixed in subsection (d) for the winding up of the affairs of the Commission.

. . . . . .

(c) The Commission may prescribe such rules and regulations as may be necessary to enable it to carry out its functions, and may delegate functions to any member, officer, or employee of the Commission. The Commission shall give public notice of the time when, and the limit of time within which, claims may be filed, which notice shall be published in the Federal Register. The limit of time within which claims may be filed with the Commission shall in no event be later than two years after the date of enactment of this Act.[2]

(d) The Commission shall wind up its affairs at the earliest practicable time after the expiration of the time for filing claims, but in no event later than three years after the expiration of such time."[3]

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[2] By Joint Resolution of April 5, 1951 (65 Stat. 28) the date of March 31, 1952, was fixed as the final date for filing claims.

[3] By Public Law 696, 81st Cong., 2nd Session, this subsection (d) was redesignated subsection (e).

STATEMENT

No issue of disputed facts is involved herein.[4] The findings of the court below (R. 22), its opinion (R. 13) and the pleadings and exhibits thereto (R.1) reveal the following facts, circumstances and events.

The War Claims Commission was created by the War Claims Act *(supra)*. On June 8, 1950, the petitioner was appointed a member of the War Claims Commission by the President of the United States, by and with the advice and consent of the Senate, to serve at an annual salary of $14,800, during the remainder of the life of said Commission, which was to expire not later than March 31, 1955.

The petitioner (a lawyer who has been admitted to practice law in the highest courts of the States of California and New York, the District of Columbia and the United States Court of Claims) entered upon the performance of his office and was duly performing his duties when he received a letter, dated December 10, 1953, from the President, reading as follows:

> I regard it as in the national interest to *complete the administration* of the War Claims Act of 1948, as amended with personnel of my own selection. To that end, Mr. C. F. Willis, Jr., of my staff transmitted my wish that you and your associate *resign your commissions*. I understand from Mr. Willis that you are unwilling to do so.
>
> Accordingly, effective as of December 11, 1953, you are hereby removed from the office of Member of the War Claims Commission.[5] (emphasis added).

The President on December 11, 1953 and while Congress was in recess appointed three persons as members of the War Claims Commission to serve during the pleasure of the President for the time being and until the end of the

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[4] The Government's counterclaim does involve disputes of fact, but that claim does not relate to petitioner's cause of action.

[5] It is significant to note the similarity of this letter with that sent by the President in the *Humphrey* case *(infra)*.

next succeeding session and no longer.[6] The petitioner on December 14, 1953, notified the President in writing, as follows:

> I have your letter of December 10, 1953, in which you state that, effective as of December 11, 1953, I am removed from the office of Member of the War Claims Commission in order that you may appoint personnel of your own selection. I deny unequivocally your right and power to take such action.
>
> While the exigencies of party politics and political commitments may make certain demands, I do not believe such circumstances should afford The President a basis for ignoring the Congressional mandate to each member of the Commission to assist the Congress in performing its traditional legislative functions of investigation and the judicial determination of the rights of innocent victims of World War II to relief under an Act of Congress.
>
> The War Claims Act of 1948, as amended, was enacted by the Congress out of a strong conviction, having no relation to political considerations, to compensate in some measure American prisoners of war and others described in the law, for pain, suffering and tremendous financial loss caused by World War II. With that view in mind, and without regard for political advantage or sectional self-interest, the Congress authorized the establishment of a Commission to serve for a fixed term of years, to carry out without regard to partisan consideration or pressure what the Congress believed to be the country's obligation to do justice to an unfortunate segment of our population. The Members of the Commission have from the day of their appointment performed their duties in the secure knowledge that their sole responsibiltiy was to make the investigations required to aid the Congress and to do justice and equity according to law to all who appeared before

[6] Upon the reconvening of the Congress, the President, on February 15, 1954, sent to the Senate the nominations of Raymond T. Armbruster, Whitney Gillilland, and Mrs. Pearl Carter Pace to be members of the War Claims Commission. The Senate did not confirm said appointments by July 1, 1954, the date on which the War Claims Commission was abolished (R. 24) pursuant to Reorganization Plan 1 of 1954, 68 Stat. 1279.

it. The duty to adjudicate the rights granted by law transcends any sense of obligation to the appointing authorities and requires a dedicated adherence to the constitutional oath of office and principles of justice, which can best exist in an atmosphere of certainty in tenure of office.

I take issue with the implications in your letter that only personnel of your selection can perform in the national interest.

There are compelling and persuasive reasons why I must resist in the manner provided by law this attempt to remove me from office. Long before I took the constitutional oath of office as an official of the United States of America, I took an oath as a member of the Bar to uphold the Constitution and the laws of the United States. As such, and as a free citizen of the greatest democracy in the world, I feel it my duty as a matter of principle to prevent a violation of our country's laws. To do otherwise would be to acquiesce in the commission of an act and the creation of a precedent which could seriously impinge on the basic concept of the separation of powers on which this country was founded.

I regret, Mr. President, that I am compelled to advise you that within the limits of my capabilities, I shall continue to resist and deny the legality of your notice of removal and the appointment of new commissioners and their right to act and perform the functions set forth in the War Claims Act of 1948, as amended, and that in accordance with the orderly processes of law, will take such action as is therein provided to obtain an adjudication of the legality and propriety of your action. Meanwhile, I consider myself to be a Member of the War Claims Commission and shall hold myself in readiness to perform the duties of that office.

Thereafter, following *quo warranto* proceedings against the President's nominees in the U. S. District Court for the District of Columbia; dismissal thereof, and appeal to the U. S. Court of Appeals for the District of Columbia,[7]

[7] This appeal was by stipulation of the parties dismissed as moot since the War Claims Commission had been abolished while the appeal was pending (R. 25).

the petitioner instituted suit in the United States Court of Claims on August 20, 1954. After joinder of the issues and trial thereof, the Court of Claims dismissed the petition holding that although the petitioner was performing a quasi-legislative and quasi-judicial function, the President possessed the power to remove the petitioner without cause before the expiration of his term because in the legislation creating the office, Congress did not place any limitation upon the President's power of removal. (R. 20). Judge Whitaker dissented, maintaining the view that the President "has no power of removal of a quasi-legislative or quasi-judicial officer unless Congress confers this power on him." (R. 21).

SUMMARY OF ARGUMENT

This case, involving the scope of Presidential removal power over quasi-legislative and quasi-judicial statutory officers is in the "field of doubt" left open by the *Humphrey's Ex'r.* v. *U. S.*, 295 U.S. 602.* In that case this Court limited itself to the conclusion that "**** under the Constitution" *** illimitable power of removal is not possessed by the President in respect of officers of the character ***" named therein (id. 629). To resolve the question before the Court an analysis is required of *what power* the President does possess over officers performing such functions.

It is not necessary to inquire whether the President possesses by virtue of the Constitution or statute any authority to remove for cause, since the petitioner was not removed for cause. The issue is whether, where the Congress creates a temporary agency to perform clearly delineated and circumscribed quasi-legislative and quasi-judicial functions within a fixed period of time provides for

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" * * To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise." (295 U.S. at 632).

the selection and nomination of the members thereof by the President to serve for a determinable period of time, without enumerating causes for removal, the President has the power or authority to remove at his pleasure such officers prior to the expiration of their term and completion of their duties. Since the source of all Presidential power and authority must be found either in the Constitution or in a grant from the Congress,[9] and since neither the Constitution nor the Act *expressly* granted such authority, his right to remove the petitioner at his pleasure can only be sustained if such authority is *impliedly* granted by the Constitution or the Act.

The significance of the ruling of the court below lies in its assumption that, absent action by Congress, there exists in the office of the President a power to remove at his pleasure quasi-legislative or quasi-judicial officers from an office created by Congress,[10] and the conclusion that since Congress did not expressly enumerate causes of removal and it is unable to find in the Act or its legislative history any congressional intent to limit such presidential authority to remove, the petitioner was legally removed from office. It is the position of the petitioner that both the assumption and conclusion of the court below are erroneous and that the proper view derived from the doctrine of separation of powers is that the President does not possess under the Constitution any power to remove at his pleasure such quasi-legislative and quasi-judicial officers and that since Congress did not grant any authority to remove the petitioner, none can be inferred to exist from the absence of express words of limitation.

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[9] *Youngstown Sheet & Tube* v. *Sawyer*, 343 U.S. 579.

[10] The effect of such assumption as to Presidential power is to jeopardize the tenure of office, and independence of officers such important agencies as Securities & Exchange Commission, 15 U.S.C. 78(d); Federal Power Commission, 16 U.S.C. 792; Federal Communications Commission, 47 U.S.C. 151; the U. S. Tariff Commission, 19 U.S.C. 1330, and U. S. District Court Judges at Hawaii, and Puerto Rico, 28 U.S.C. 134(a), all of whom have been appointed for fixed terms of years with no cause for removal enumerated. But see footnote 21 regarding legislative history of Federal Power Commission.

The petitioner submits to this Court that he was an officer, performing quasi-legislative and quasi-judicial functions outside the orbit of the chief executive's duties and responsibilities; that the Constitution neither by express language, implication nor as an incident of office grants the President authority to remove such officers; that the statutory grant of authority to the President to nominate and appoint quasi-legislative or quasi-judicial officers with the advice and consent of the Senate to a temporary agency for a fixed or determinable term of office, without enumerating any causes for removal, does not carry with it by implication or as an incident thereof or inherent therein, the power to remove such officers at his pleasure.

ARGUMENT

I.

The Members of the War Claims Commission Performed Quasi-Legislative and Quasi-Judicial Functions

In the *Humphrey case (supra)*, this Court stated that the concept of power of removal discussed in *Myers* v. *U. S.*, 272 U.S. 52, was "*confined to purely executive officers*" but "*that illimitable power of removal is not possessed in respect of officers of the character just named*" and that "*as to officers of the kind here under consideration no removal can be made during the prescribed term except for one or more of the causes named in the applicable statute.*" The kind of officers the Court had in mind can best be determined by reference to its opinion. In essence the Court found, that, it is officers whose duties are quasi-legislative or quasi-judicial rather than executive, who are protected against the President's removal power. Among the examples given by the Court, in addition to the members of the Federal Trade Commission, were members of the Interstate Commerce Commission and judges of the U. S. Court of Claims. Analyzing the nature of the functions and duties

assigned to the War Claims Commission in the light of this opinion compels the conclusion that it comes within the category of agencies which this Court in the *Humphrey case* said was to be free from the coercive influence of the President's removal power.

The court below found that the "War Claims Commission was clothed with no executive powers," and that powers conferred on it "*** were wholly judicial or perhaps legislative in character. ***" (R. 16).[11] The quasi-legislative and quasi-judicial character of the functions of the War Claims Commission can best be determined by using as a frame of reference the criteria adopted by this Court to arrive at its conclusion that the Federal Trade Commission was a quasi-legislative and a quasi-judicial agency whose members enjoyed freedom of control by the President.

The Court's main inquiry in the *Humphrey case* was into the "ends which Congress sought to realize." The provisions of the Act and legislative history show that what the Congress envisaged in establishing the War Claims Commission was an independent agency[12] which would operate for about six years or less, or as the President said "as a temporary agency" (Reorganization Plan No. 1, 1954, House Document No. 381, 83rd Congress), primarily to assist the Congress in considering and disposing of a highly technical and complex set of legislative problems—as dis-

[11] The Court of Claims devoted one-third of its opinion to an exhaustive and detailed analysis of the functions and responsibilities of the War Claims Commission and concluded that the Commission "was acting in a quasi-judicial capacity; or, perhaps as an agent of Congress. * * * The powers conferred upon it * * * were wholly judicial, or, perhaps, legislative in character. * * * Other duties were also put upon the Commission * * * not of an executive but of a legislative nature. * * * There can be no doubt that in discharging this function the Commission acted as an agent of the Congress. * * * Nowhere in the Act is there cast upon the Commission the discharge of any executive function. All of its functions were of a nature either judicial or legislative" (R. 13 *et seq*).

[12] In the manner of its selection and appointment of members, fixing of a term of office and absence of grounds for removal, the Congress followed the pattern it adopted for the Philippine War Damage Commission (50 U.S.C., App. Sec. 1751, *et seq.*).

tinguished from executing the law—and performing functions "which belong primarily to Congress as an incident of its powers to pay the debts of the United States and one which it had the discretion either to exercise directly or to delegate to other agencies." (See *Williams* v. *U. S.*, 289 U.S. 553).

The War Claims Act was, therefore, the means Congress adopted to discharge three separate functions: (1) the function it had reserved to itself in Section 12 of The Trading with the Enemy Act (50 U.S.C. App. Sec. 12), of disposing of vested assets of enemy nations in such manner as it might deem expedient (*Woodson* v. *Deutsche Gold*, 292 U.S. 449); (2) adjudication of claims for compensation of U. S. citizens who were victims of enemy action; and (3) a study and survey of the nature, extent and scope of certain claims arising out of World War II.

To accomplish these purposes, the Congress, in the original Act, and as amended, established the War Claims Commission and provided for and directed (1) the *adjudication* of certain categories of claims, notably those of certain civilian American citizens interned in designated areas in the Pacific theater of operation, American military personnel taken prisoners of war, and of certain American religious institutions for certain losses sustained in the Philippines; (2) the establishment of a war claims fund; and (3) the War Claims Commission to make a general survey of the problem of war claims arising out of World War II, exclusive of those claims, considered to be of an urgent, emergency nature and already recognized by the War Claims Act.

Specifically by Sections 2 and 13 of the Act a trust fund was created in the Treasury consisting of moneys covered into the Treasury under Section 39 of The Trading with the Enemy Act (*supra*) and the War Claims Commission was authorized to dispose of these funds. By Section 2(b) of the Act, the Commission was authorized to appoint such personnel and to make such expenditures as might be

necessary for carrying out its functions. By Section 2(d) (1) the Commission and its designated employees were authorized for purposes of "any hearing, examination or investigation" *to issue subpoenas requiring persons to testify or to appear and produce documents* and under 2(d)(2) seek the aid of the United States District Court to enforce compliance with such subpoenas. Section 3 of the Act was a grant to the Commission of "*jurisdiction to receive and adjudicate according to law claims as hereinafter provided.*" Sections 5, 6 and 7 of the Act authorized the Commission to *receive and adjudicate according to law* and *provide for payment* by certificate to the Secretary of the Treasury to pay (without review by him) out of the trust fund, certain claims of civilian internees, prisoners of war and religious organizations. Section 8 of the Act required the Commission to conduct an inquiry into war claims other than those provided for in the Act and to prepare a report for the Congress of the type of claims to be considered by Congress and the methods to be employed in handling them and such other recommendations as the Commission deemed appropriate to carry out these recommendations. Section 9 of the Act required the Commission to report every six months to the Congress—*not to the President*—on the operations of the Commission. Section 11 of the Act provided that claimants should have the right to a hearing on their claims. Although an appeal procedure was provided by the Commission within its own organization pursuant to its own regulations, the Commission's decisions were to be "* * * * *final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise.* * * *"[13]

In the *Humphrey case*, the Court in examining the ends which Congress sought to realize found that the administration of the provisions of the Federal Trade Act for the prevention of "unfair methods of competition" involved

[13] Contrast this finality, with the authority vested in the Federal Security Administrator by Section 4 of the Act.

"filling in and administering the details embodied by the general standard," which Congress enacted and was not therefore an executive function. Just as the Federal Trade Commission had to fill in and administer the details of the general standard of "unfair methods of competition," the War Claims Commission was also given a set of general standards which the Congress expected it to use. For example, the administration of the civilian internee program (Section 5(a)(b)) involved the filling in of details of such standards as, *voluntary aid to or collaboration with the enemy*, and remaining *in hiding to avoid being captured or interned* by the enemy. In the prisoner of war program (Section 6(b) (d)), there were such standards as *inhumane treatment*, and *the violation by the enemy government . . . of its obligation . . . under the Geneva Convention* . . . The religious organization program (Section 7(a) and (d)) required determination of questions of *affiliation* and the ascertainment and establishment of *fair value of supplies* and of *fair and equitable postwar replacement costs*.[14]

A further index of the quasi-legislative character of the Federal Trade Commission was found in the provisions of Section 6 of that law authorizing investigation and the filing of reports and recommendations to Congress and that some of the investigations had given rise to legislation. The War Claims Commission also made investigations and reports and recommendations to the Congress which gave rise to legislation. (See page 18 *infra*.)

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[14] "When Congress enacts a statute that is complete in policy aspects and ready to be executed as law, Congress has recognized that enforcement is only an executive function and has yielded that duty to wholly executive agencies, even though determination of fact questions was necessary. Examples of the creation of such rights and obligations are patent, revenue and customs laws. Only where the law is not yet clear of policy elements and therefore not ready for mere executive enforcement is it withdrawn from the executive department and confided to independent tribunals. If the tribunal to which such discretion is delegated does nothing but promulgate as its own decision the generalities of its statutory charter, the rationale for placing it beyond executive control is gone." (Dissenting opinion of Justice Jackson, *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 488.)

As early as 1946 hearings were held by Congress on the general subject of "Foreign War Damage Claims." (See Hearings before a Subcommittee of the Senate Judiciary Committee on S. 1322, 79th Cong. 2nd Sess., April 17, 1946). It soon became clear to the Congress that the problem of settling war claims presented many difficulties, resulting largely from the complex character of the losses and damages, the diversity of possible responsibilities, the variety of legal means available to achieve indemnification, and the legal obstacles to surmount in the process. In view of the great number and variety, as well as the aggregate amount of such claims, it appeared to be highly desirable that legislation for their payment be preceded by careful study, for aside from the problem of what claims should be paid and the equitable treatment of various types of claimants with respect to priorities, there was also involved the fundamental problem of the ultimate source and the amount of the funds to be used for their satisfaction.

In authorizing the War Claims Commission to prepare a report on this general subject, the importance of obtaining an over-all picture of war claims before attempting to provide for their settlement was recognized for the first time, after any war, by the Congress. This recognition is expressed in the language of the Interstate and Foreign Commerce Committee of the House of Representatives, in reporting HR 4044 which ultimately became The War Claims Act of 1948, wherein it stated: "*** *the question of war claims and debt claims is too complex to be approached by the Congress on a piecemeal basis* *** *the subject in its entirety must be studied thoroughly before any intelligent action can be taken by the Congress with respect to any particular aspect of war claims and debt claims.*" (Report of Interstate and Foreign Commerce Committee of the House of Representatives on HR 4044—Report No. 976, 80th Congress, 2nd Sess.). The Act was subsequently described by this Court as a "*** *measure establishing a commission on the problem of compensating American*

prisoners of war, internees and others who suffered personal injury or property damage at the hands of World War II enemies. Congressional attention was focused on the nature of these claims and methods of adjudicating them ***", *Guessefeldt* v. *McGrath*, 342 U.S. 308, 315.

This problem was viewed so seriously that HR 4044, 80th Congress, 2nd Sess., originally provided in Title II thereof for the establishment of a War Claims Commission with the *sole* function of submitting a comprehensive report to the Congress, which would present all pertinent facts and would make recommendations with respect to the adjudication and payment of these claims, it being recognized that this legislative problem was of such dimensions as to preclude its comprehensive study by congressional committees. This bill would have given the Commission approximately 8½ months to complete the report. The Senate Judiciary Committee reported favorably on HR 4044 but with an amendment in the nature of a substitute which conferred adjudicatory jurisdiction on the Commission as to the claims defined therein, but it, too, contained the provision for the report, embodied in Section 8. The substantive features of the report required by the Senate were practically identical with the provisions of Section 8 of the War Claims Act as finally enacted, with the exception that it limited the time for completion of the study to a period of two years and eight months. (Report of the Senate Judiciary Committee on HR 4044, Report No. 1742, 80th Congress, 2nd Sess.). A Conference Committee which favorably reported the amended bill, kept intact Section 8 of the Act as it appears in the final legislation, estimated that a staff of approximately 35 people, the assistance of employees of other agencies of the Government on a temporary basis, and an appropriation of approximately $275,000 would be required just to complete the report (House Conference Report, No. 2439, 80th Cong., 2nd Sess.).

Section 8 of the War Claims Act of 1948, which provides the Congressional frame of reference for the Commission's

study, called for the following information, evaluations and recommendations:

1. The estimated number of and amounts of war claims arising out of World War II, classified by types and categories;
2. The extent to which such claims have been or may be satisfied under international agreements or domestic or foreign laws;
3. The categories and types of claims, if any, which should be received and considered and the legal and equitable basis therefor;
4. The administrative methods by which such claims should be considered and any priorities or limitations which should be applicable; and
5. Any limitations which should be applied to the allowance and payment of fees in connection with such claims.

In accordance with this Congressional mandate, the War Claims Commission entered upon its study of this legislative problem and submitted two major reports to the Congress, the first of which was Report of the War Claims Commission Concerning Personal Injury and Property Claims Arising Out of World War II, of March 31, 1950 (House Document No. 580, 81st Congress, 2nd Sess.). Because of the complexity of the subject limitations of time and other factors, this report, of necessity, had to be an interim report (see introductory note to that report). On January 16, 1953 the War Claims Commission submitted to the Congress its "Supplementary" Report on War Claims. (House Document No. 67, 83rd Congress, 1st Sess.). An examination of this report demonstrates that it represents a comprehensive study, with recommendations as to legislation on all phases of the war claims problem. As a result of the recommendations of the War Claims Commission, the Congress has enacted several bills. (See Page 18, *infra*). What this Court said of the Federal

Trade Commission in the *Humphrey case* is just as applicable to this Commission: "In making investigations and reports thereon for the information of Congress * * *, in aid of the legislative power, it acts as a legislative agency."

In analyzing the Federal Trade Commission, this Court in the *Humphrey case* looked to the legislative history of the law which created it, to support its conclusion that the Federal Trade Commission was intended to "exercise its judgment without the leave or hindrance of any other official or any department of the government." In the case of the War Claims Commission, its legislative history supports the same conclusion, but it is submitted that there is no need to go beyond the unambiguous words of the Act itself, Congress having declared in Section 11 of the Act: "*The action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise* ***." Compare this provision with Section 9(a) of The Trading with the Enemy Act *(supra)* which gave the Attorney General authority to receive and determine claims for the return of vested property or the proceeds thereof but authorized any dissatisfied claimant to apply to the President and to appeal to the Courts if aggrieved thereby, whereas the War Claims Commission's decisions were final, not subject to review by either the President, any other executive officer, or any judicial tribunal. What this Court said of the Federal Trade Commission should apply with equal force to this Commission: "*Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.*"

Another factor which this Court in the *Humphrey case* believed protected the Federal Trade Commission members against removal by the President at his pleasure was the intent of Congress as evidenced by the language of the statute "to create a body of experts who shall gain experi-

ence by length of service." It is not urged that Congress intended to prolong the War Claims Commission through the years since the Commission was created only to perform certain specified tasks in a limited period of time and was in fact abolished as of July 1, 1954 (see footnote 6, *supra*). It was nevertheless contemplated that the members of the Commission (two of the three were *required* to be members of the bar) apply to their functions the experience gained by their investigations, studies and adjudications. That conclusion must follow from the very nature of the functions assigned to it.

Under the scheme of the Act, it was to administer only a limited fund (derived from proceeds of vested property covered into the Treasury) but during the life of the Commission this fund was substantially increased. The Act setting up the War Claims Commission provided for the creation of several classes of beneficiaries, with sufficient opportunity as the circumstances arose of adding new classes. New classes were added from time to time following recommendations made to the Congress by the Commission[15]. The members of the Commission were given the assignment not only of administering the limited program of benefits provided by the Act but also of conducting a study during the period of time fixed for its existence into the nature and number of various other potential beneficiaries and the estimated amount of their claims.

The original Act called for payments to certain religious organizations in the Philippine Islands by way of remuneration for expenditures made during the war for the benefit of Americans. After several years of study and experience, Congress aided by reports and studies of the Commission amended Section 7 of the Act (Public Law 303, 82nd Cong., April 9, 1952), to provide for compensation for such religious organizations for war damage to their property and for

[15] See Public Law 303, Chap. 167, 82nd Cong., 2nd Sess.; Public Law 866, 81st Cong., 2nd Sess.

payments to these organizations of amounts sufficient to restore to pre-war capacity any hospitals in which it had an interest or to which it had contributed a staff. The determination thereof obviously required performance of judicial functions as to the extent of war damage, the amount sufficient to restore the capacity and the institutions in which an interest existed and to which it had contributed a staff. Since time was of the essence in such a program, Congress directed the Commission (Public Law 303, Chap. 167, 82nd Cong., 2nd Sess.) to commence at once to set up procedures for the payment of the newly authorized claims, even before receipt thereof, using as a basis the Commission's experience with other claims filed by various organizations under the original Act. It is not conceivable that the Congress would have expected such functions to be performed by a Commission whose members might change from day to day at the pleasure of the President.[16] Speaking of the Federal Trade Commission, the Court said: "Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts appointed by law and informed by experience."[17]

This Court also found that the Federal Trade Commission had a quasi judicial character, since, for example, under its statute it could be given the duties of a master in chancery in certain antitrust suits (See also *Federal Trade Commission* v. *Ruberoid, (supra).*) The War Claims Commission, it is submitted, in the types of claims over which it possessed jurisdiction, exercised a judicial

[16] Early versions of the War Claims Act, H.R. 873, 1000 & 1823, 80th Cong., 1st Session, contained language authorizing the President to fix an earlier expiration date for the Commission but this provision was eliminated from bill as finally enacted.

[17] "In some respects, the War Claims Commission compares even more closely with the Interstate Commerce Commission, than does the Federal Trade Commission. The Federal Trade Commission has nothing to resemble the rate-making power which marks the Interstate Commerce Commission as a quasi-legislative agency. The War Claims Commission on the other hand, in connection with its religious program, must make determinations of "fair and equitable post-war replacement costs."

power similar to some of the functions of the Court of Claims. It is not contended the War Claims Commission in all respects exercised the judicial power contemplated by Article III of the Constitution but rather the judicial function of a "Legislative Court." (See *Williams* v. *U. S.*, *(supra)*.) Sections 3, 5, 6 and 7 of the Act were grants to the Commission of "jurisdiction to receive and adjudicate claims according to law * * *" Sec. 2(d) authorized the use of the subpoena power and Section 11 kept its decisions free of review by any other official of the United States or by any court, by mandamus or otherwise.

In the *Humphrey case* the Court found that the Federal Trade Commission "must, from the very nature of its duties act with entire impartiality". The War Claims Commission was required to "adjudicate claims according to law", not to execute or enforce law, and like the Federal Trade Commission, it was "charged with the enforcement of no policy except the policy of law. Its duties are neither political nor executive but predominantly quasi-judicial and quasi-legislative."[18] The standards used by this Court in analyzing the Federal Trade Commission, we submit, fit the War Claims Commission. If one is quasi-legislative and quasi-judicial, so is the other. This Commission like the Federal Trade Commission "* * * *is not only wholly disconnected from the executive department but * * * was created by Congress as a means of carrying into operation legislative and judicial powers* * *" and "*to the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers* * *."

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[18] See footnote 13 *(supra)*.

II.

The President does not possess under the Constitution power to remove at his pleasure quasi-legislative or quasi-judicial officers

From the very beginning of our Government, there has been a continuing debate and dispute, Congressional and judicial, as to the existence of and the scope of President's removal power over public officers appointed by him. With rare exceptions[19], the disputes which reached this Court were concerned primarily with the power in the office of President to remove persons serving in the executive branch of the Government. Until the decision of this Court in *Myers* v. *U. S., (supra)*, no complete historical and philosophical discussion of the nature of the President's constitutional power over public officers or the background had been made by this Court; its prior decisions resting primarily on an interpretation and construction of Congressional intent and not on the fundamental constitutional question[20].

The decision in *Myers* became the basis for the concept that as to all officers "appointed" by the President, term of office and tenure was of no significance; "right to hire was the right to fire" became the answer to all questions regarding the protection of tenure, term of office or independence in office, to the degree that Congress believed no need existed to mention or provide grounds for removal in pending legislation.[21] The future of the independent agencies and officials became a source of concern to all interested in the

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[19] *Marbury* v. *Madison*, 1 Cranch 137; *Ex parte Hennen*, 13 Pet. 230; *Goodrich* v. *Guthrie* 17 How 284; *McAllister* v. *U. S.*, 141 U.S. and *Reagan* v. *U. S.*, 182 U.S. 419.

[20] *U. S.* v. *Perkins*, 116 U.S. 483; *Parsons* v. *U. S.*, 167 U.S. 324; *Keim* v. *U. S.*, 177 U.S. 290; *Burnap* v. *U. S.*, 252 U.S. 512; *Shurtleff* v. *U. S.*, 189 U.S. 311.

[21] See 72 Cong. Rec. 10332 (Debates on creation of Federal Power Commission); See also 74 Cong. Rec. 1445, 1597, et seq., (relating to removal of members of the Federal Power Commission).

maintenance of both the separation and interdependence of the three branches of Government.[22]

Resort to historical utterances and results of debates without considering all of the other circumstances results in an ambivalence of ideas and principles that leads to confusion and eventual deterioration of basic concepts. The premise that the decision of the First Congress[23], regarding the establishment of the predecessor to the present Department of State confirmed the existence of Presidential removal power, lead ultimately to the decision in *Myers* and the misunderstanding which followed it.

With the decision of this Court in *Humphrey*, a large measure of this concern and misapprehension was dissipated when it became clear that the principles enunciated in *Myers* were limited in their application to *certain* executive officers and did not and should not be religiously applied to all officers who may have been appointed by the President, and that it was the nature of the office rather than the circumstance of Presidential appointment which fixed the limits of Presidential removal power. In the light of the constitutional precepts restated by this Court in *Humphrey*, the debates in the First Congress of the United States and during the administration of Jackson and Johnson, the various decisions of this Court starting with *Marbury* v. *Madison* (*supra*) can now be placed in their proper context.

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[22] See *Selected Essays on Constitutional Law* (1938) IV, 1467; Consequences of President's Unlimited Power of Removal; *Political Science Quarterly*, XLI (Dec. 1926); The Bearing of Myers v. United States upon the Independence of Federal Administrative Tribunals—a Criticism, *American Political Review*, XXIV (Feb. 1930) 59 and Consequences of the Myers Decision, *American Law Review*, LXI (July-August, 1927) 481.

[23] The facts that the first Senate was so evenly divided that the vote of the Vice President was needed to support the view that removal power existed, *Story, Constitution of U. S.*, 5th Ed., Sec. 1542 and that the vote in the House of Representatives was 34 to 20 (The Papers of American Historical Society, Vol. 4, 491 report the vote as 29 to 22) certainly are not indicative of a clear and overwhelming view of the existence of such removal power over executive officers. Justice McLean dissenting in *Goodrich v. Guthrie*, (*supra*) speculates whether the votes would have been the same if taken at the time (1854) he wrote his dissent.

The correct view of Presidential authority appears to be that within the orbit of his constitutional and statutory duties and responsibilities the President must of *necessity*[24] have a measure of "absolute" authority over those appointed to act for him or to perform functions that "take care that the laws be faithfully executed." But even in this area, the Congress possesses and has exercised a degree of control, by giving assurances of tenure, fixing terms of office and limiting removal[25].

That this principle of necessary power was limited to executive officers was a distinction first noted in *Marbury* v. *Madison (supra)* when this Court held a Justice of Peace secure in his term of office. The doctrine of *necessity* for a power of removal over executive officers was also set forth in *Ex parte Hennen (supra)* where this Court said: "• • • the power of appointment carried with it the power of removal. • • • The reason for the principle is that those in charge of and responsible for administering functions of Government who select their *executive* subordinates *need* in meeting their responsibilities to have the power to remove those whom they appoint • • •." (emphasis added). The distinction was again noted in the dissenting opinion of Justice McLean in *Goodrich* v. *Guthrie (supra)* where he said (at p. 308 and 310): "• • • But this power of removal from office was neither exercised nor supposed to apply until recently to the judicial office." • • • It is argued that, as the President is bound to see the laws faithfully executed, the power to remove unfaithful or incompetent officers is necessary. This may be admitted to be a legitimate argu-

[24] A doctrine whose use was criticized by Chief Justice Marshall in *American Insurance Co.* v. *Canter*, 1 Pet. 511 and by this court in *Youngstown Sheet & Tube* v. *Sawyer (supra)*.

[25] In the field of foreign affairs, it adopted the Foreign Service Act of 1924 (35 Stat. 672) and Foreign Service Act of 1946, 22 U.S.C. Sec. 801, et seq., fixing grades, salaries, appointments and promotions. It provided for a Career Civil Service applicable even to lawyers serving the Attorney General (See *Roth* v. *Brownell*, 215 F. 2d 500, cert. den.; *Brownell, etc.* v. *Roth*, 348 U.S. 863) and provided preferences for veterans and imposed restrictions on their discharge and removal 5 U.S.C. 851 and even fixed limitations on discharges for loyalty. *Cole* v. *Young*, 351 U.S. 536.

ment as commonly applied to executive officers. My own view is, that the power to see that the laws are faithfully executed applied chiefly to the giving effect to the decisions of the courts when resisted by physical force. But however strongly this may refer to the political officers of the government, how can it apply to the judicial office? * * *"

It is this concept of necessity which forms the basis of the implied power to remove, but can it be said that there exists or ever existed a similar need over the judicial or legislative branches of the Government. This Court in *Humphrey* said, citing *Story on Constitution of U. S. (supra)*, "that neither of the departments in reference to each other ought to possess, directly or indirectly an overruling influence in the administration of their respective powers." Justice Story continued to say in his monumental work (Sec. 531) that: "* * * in order to preserve in full vigor the constitutional barrier between each department when they are entirely separated, it is obviously indispensable that each should possess equally and in the same degree, the means of self-protection."

It is recognized that the general rule precludes the use of congressional debates to explain the meaning of words of the statute; they may however be considered as reflecting upon its general purposes, *Humphrey's Ex'r. v. U. S. (supra)*. The debates in the House of Representatives indicate clearly the type of agency it was attempting to create. In the early days of the Second Session of the 80th Congress, which enacted the War Claims Act, there was great insistence that immediate relief be given to victims of the war. Congressman Wolverton addressing the House, sitting as a committee of the whole, discussed the recommendations of the Committee on Interstate and Foreign Commerce, as follows:

> "It can be readily seen from this brief description * * * that there is no intention to determine by the legislation now before us any general or specific policy with respect to the character of claims to be recognized or priorities as between different categories or types of claims or the

> basis on which the amount of compensation is to be determined. * * * The only intelligent and common sense way in the opinion of the committee is to provide for a commission to make the necessary and detailed study and examination of facts and principles that is necessary if justice and equity are to prevail." (94 Cong. Rec., P. 553, et seq.).

Congressman Gearhart, one of those pressing for immediate payment of claims by giving jurisdiction to the District Courts, used the following significant language: "* * * is it necessary for us to create another commission * * * to perform a congressional function when there is already available * * * the Federal judiciary * * *." (94 Cong. Rec. p. 564) Does this indicate the intent to create an agency which falls within the sphere of executive influence? Is this the type of officer over whom the members of the constitutional convention and the First Congress believed the President possessed the power of removal[26] as an incident of appointment? It is submitted to this Court that it was never intended that the Constitution should create in the President removal power over such officers.

That the power to legislate includes the incidental power to make investigations in aid of legislation is a general principle no longer questioned. It is obvious that the nature of such investigations would be limited and lose the benefit of objectivity if the officers making it are subject to executive control by virtue of the removal power. "* * * one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Ex'r.* v. *U. S. (supra)*:

The concept of "necessity" as supporting the existence of a power of removal over purely executive employees is similarly the basis for denying its existence over officers per-

[26] Justice Story in his work on the Constitution (Sec. 541) questions whether it was ever contemplated that the removal power existed before the Constitution was finally adopted. See also No. 77, The Federalist which seems to say that removal existed only with the concurrence of the Senate.

forming quasi-legislative and quasi-legislative functions. "The separation of powers found in the Constitution is not merely a matter of convenience or governmental mechanism. Its object is basic and vital; namely, to preclude a commingling of these essentially different powers of government in the same hands," *O'Donoghue* v. *U. S.*, 289 U.S. 516. The duties and responsibilities of the executive branch do not encompass investigations and inquiries which form the basis of legislation for the payment of the debts, expenditure of public monies or who shall be the recipients of benefits for suffering at the hands of the enemy. The President may recommend, may urge, may even "demand", the enactment of legislation, prompted by what he believes to be the will of the people, their best interests, or the promises or commitments of his administration, but the ultimate decision and the establishment of the policy rests with the Congress. To fulfill its obligations, it must be assured that officers, whose selection the Congress may have vested in the President subject to confirmation by the Senate, will after appointment perform their quasi-legislative or quasi-judicial functions in accordance with and in the manner prescribed by the congressional mandate.

Many have seen our Government grow from a small number of executive departments to a complex of Boards, Bureaus, Commissions, Agencies, Corporations, "Administrative Tribunals" and departments, headed by Cabinet Officers, Administrators, Commissioners, Directors, Board members and Chairmen. Some have been placed and created within or under the aegis of designated departments; others under the Office of the President and still others as Independent Agencies. These instruments of Government tell us what foods are fit for human consumption, what drugs can be offered to cure our physical and mental ailments, what we are entitled to receive for the loss of limb, earning capacity and life itself. They direct how employer and employee may conduct their affairs with one another, they tell us how to mine our coal, how, and where to distribute oil, gas and electric energy, how, who, where and when we

may use the airways for the dissemination of news, information and entertainment, they limit the rates that may be charged for the transport of goods and persons on land, on sea and in the air, they limit, control and authorize the use of atomic and nuclear energy, the use of our farm lands, navigable rivers and waters, they influence the rates of interest, affect the supply of money and the scope of credit, they tell us how we may advertise our wares, and how we may sell and market interests or participation in our business or industry. Yet each is a creature of the Congress and created to perform its task according to standards laid down for it.[27] When the law creating each is complete in all policy aspects, it is recognized as an executive function and properly assigned to the executive branch, but where the policy is not complete or there is required the filling in or administering of details of a legislative standard, the delegation has been to are independent quasi-legislative or quasi-judicial office.[28]

The "blending" of other functions into the executive branch was recently criticized (*Reid* v. *Covert*, 77 S. Ct. 1222, 1242) (June 10, 1957) and the delegation of such functions to the executive branch has been consistently struck down by this Court. In *Schecter Poultry Corporation* v. *U. S.*, 295 U.S. 495, 529, this Court said:

> (2) Second. *The Question of the Delegation of Legislative Power.*—We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. Panama Refining Company v. Ryan, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446. The Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article 1, § 1. And the Congress is authorized "To make all Laws which

[27] The influence, dignity and importance of the action by these agencies increase as the years go by. Only recently this court had occasion to refer an issue of fact to such a body rather than a "court of law". (See *U. S.* v. *The Western Pacific R. R. Co.*, 77 S. Ct. 161).

[28] See footnote 14, (supra).

shall be necessary and proper for carrying into Execution" its general powers. Article 1, § 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the Panama Refining Company Case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. Id. 293 U.S. 388, page 421, 55 S. Ct. 241, 79 L. Ed. 446."

If, therefore, the officers of such instrumentalities as the War Claims Commission (by virtue of the circumstance that Congress vested their *selection* in the President and mindful of the importance of the functions, required the consent and advice of the Senate,) become subject to the domination and control of the President, through his power of removal (unless Congress expressly denies him such power), there ceases to exist "in full vigor the constitutional barrier between each department" of which Justice Story speaks in his treatise (supra) and we have the commingling which so concerned this Court in *O'Donoghue v. U. S., (supra)*.

The answer suggests itself: the President in the field of legislative and judicial concern has no removal power except as may be validly delegated to him by Congress; that by virtue of the congressional vesting of the power of *selection* in the President, subject to Senate confirmation, there does not accrue to him impliedly or as an incident thereof, the

power of removal. Upon selection, confirmation and appointment, the executive's function as to such officers are completed.[20]

To hold otherwise would be to sanction an unfortunate anomaly. When Congress vests the power of appointment in the heads of departments we have the situation stated by this Court in *U. S.* v. *Perkins, (supra)*:

> "* * * Congress has by express enactment vested the appointment of cadet engineers in the secretary of the navy, and when thus appointed they become officers and not employees * * *. It is further urged that this restriction of the power of removal is an infringement upon the constitutional prerogative of the executive, and so of no force, but absolutely void. Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate, under the authority of the Constitution (article 2, § 2,) does not arise in this case, and need not be considered. We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. The head of a department had no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legis-

[20] This Court in *Humphrey* said the *Myers case* sustains "* * * the unrestrictable power of the President to remove purely executive officers * * *." This power must exist because the Constitution "requires" that the President have the power to remove officers appointed by him to perform duties which are his legitimate concern. The President's power to remove thus found in the Constitution stems not from the act of appointment but rather the necessity to control those who act for him in fulfilling his constitutional obligations. All other authority to remove can only arise by virtue of a valid congressional vesting of such power and authority, and the source of authority must therefore be the statute itself. If the statute *grants* authority to appoint, the power to remove must be found somewhere in the statute itself and not in the power to appoint. Only in this way can the doctrines of separation of powers and checks and balances have real vigor and meaning.

> lation he must be governed, not only in making appointments, but in all that is incident thereto."

when however Congress, because of the dignity and importance of the office seeks not only selection by the President, but the advice and consent of the Senate, is the officer thus appointed to be less secure, less independent, and more subservient to the domination and control of the President than an "inferior officer" whose appointment is vested in the courts of law or the head of a department (who holds his own office by virtue of presidential appointment)?

III.

Congress Validly Curtailed and Restricted the Removal of Petitioner

On the premise that the War Claims Commission is a quasi-legislative and quasi-judicial agency and that as to such agencies Congress possesses, as an appropriate incident of its authority, the power to limit, condition, restrict or curtail whatever power of removal the President may possess, an examination of the War Claims Act in the frame of reference established by the *Humphrey case*, makes it clear that the Congress did not intend the President to have the authority to remove the petitioner *at his pleasure*. The Act made no grant of power to the President other than selection and appointment of members, after Senate confirmation; it fixed the expiration of the petitioner's term and failed to specify, authorize or enumerate any causes for removal. The purposes for which the Commission was created, the character of its organization and functions and the conduct of Congress are clear indices of the intent of Congress to preserve the doctrine of separability and keep its members free from removal at the pleasure of the President.

Congress was legislating against a historical background which gives meaning to the absence of an express grant of power to remove or enumeration of causes for removal. It must be presumed that it was aware of the rulings of this

Court in *Humphrey* and *Myers* and even the decision of the Court of Appeals for the 6th Circuit in *Morgan v. TVA*, 115 F. 2d 990. Congress recognized that a quasi-judicial and quasi-legislative officer required to "adjudicate according to law" and to act as an aid of the legislative branch "should be free from the remotest influence, direct or indirect" of the other departments and that "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independency against the latter's will." It knew that this Court in the *Humphrey case* had found that even "* * * *the fixing of a term subject to removal for cause unless there be some countervailing provision or circumstance indicating the contrary* * * * *is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause.*

It is not urged that by merely providing a term of office, Congress intended to limit the power to remove an officer who would otherwise be subject to such power. If the office is *purely executive* the President's removal power (the *Myers case* holds), cannot be limited. Where, however, there is no question that the office is quasi-legislative or judicial, as distinguished from executive, the fixing of a term is also evidence of the intent of Congress to create an agency outside the orbit of the executive's power of removal. The members of the War Claims Commission serve for the term fixed by the Act. Section 2(a) thereof stated that the "*terms of office*" of the members of the Commission "*shall expire at the time fixed in Subsection (d) for the winding up of the affairs of the Commission.*" The Act provided that the Commission shall wind up its affairs at the earliest practicable time after the expiration of the time for filing claims but not later than three years after the expiration of such time. The "bar date" originally fixed for filing of claims was March 31, 1951. It was extended for one year by Public Law 16, 82nd Congress, thus requiring completion of the Commission's work by March 31, 1955. Public Law 303 of the 82nd Congress extended the "bar date" for

another year but again mindful of its intention to create a "temporary agency," the Act included a provision against an extension of the life of the Commission beyond March 31, 1955. That then was the date the term of the members "shall expire", except for the sole contingency that the work of the Commission might be wound up sooner. It is the creation of a term rather than the particular words and formula to be used in determining it which is significant. The provision for termination on the happening of an event evidences an intent of Congress that the term shall not be curtailed except upon the happening of that event, i.e., winding up of the affairs of the Commission.[30]

It may be argued that under the rules of statutory construction used by this Court to determine the existence of congressional intent to restrict removal, that the absence from the Act of language specifying a term measured in units of time and the lack of any mention of grounds for removal should be treated as an admission that the members of the War Claims Commission were not free from removal. Such omission of a specific prohibition against removal should not be construed as an admission that the President had the power because Congress knew he had only such powers in the case of quasi-legislative and quasi-judicial agencies as Congress gave to him. The only construction which can be placed on the absence of an enumeration of one or more specific causes of removal in the instant Act is an intent that none shall be available to the appointing authority.

This Court has said that when a statute creates an office *without* a specified term, authorizes appointment and says nothing of removal, that the President may remove at his pleasure.[31] But this rule was developed to ascertain term and tenure of "executive" officers and like the rule of con-

[30] If the term of the Federal Commissioner in the *Humphrey case* was geared to the completion of a task with the further provision that it not run beyond a specific date as was the term of the petitioner, it probably would not have changed this Court's view.

[31] *Myers* v. *U. S.* (supra), p. 187.

struction followed in *Shurtleff* v. *U. S., (supra)* should not be used to determine whether Congress intended to restrict or grant the power of removal over a quasi-legislative or quasi-judicial officer. This, we suggest, is implict in the Court's ruling in *Humphrey*. When the Act was passed, Congress was dealing not with an executive agency and we should not treat the petitioner's term as were the terms of office discussed in *Parsons* v. *U. S.* *(supra)* or in the *Myers case (supra)* which concerned purely executive officials and functions.

Nor can it be said the Congress fixed an expiration date for the term of the petitioner only for the purpose of avoiding life tenure as in the *Shurtleff* case, for in the case of the War Claims Commission tenure for more than six years was impossible since the Commission's existence was limited to that same term.[32] In the case of the War Claims Commission, the term of office would automatically come to an end with the winding up of the affairs of the Commission, so that specification of a term in days, months or years was unnecessary. If the language of the Act that the term of the petitioner *shall* expire with the winding up of the affairs of the Commission does not mean he is to serve without interference of the President until the affairs have been wound up, then it has no meaning at all.

In *Morgan* v. *TVA, (supra)* the sixth circuit has before it the question of scope of Presidential removal power and the intent of Congress to curtail it. That court found considerable evidence of congressional intent not to limit the President from the fact that a branch of Congress acted favorably on the nomination of a successor to the vacancy created by the disputed removal. In the instant case it should be noted that just the reverse occurred. When the President submitted to the Senate on February 23, 1954 the nomination of a successor to the petitioner, the Senate (controlled by members of the same political persuasion as the Presi-

[32] In fact the Commission was abolished prior to the expiration date. See footnote 6, *supra*.

dent) failed to take any action by the time the Commission was abolished. (R. 24).

In *Humphrey*, this Court said: "* * * *if the intention of Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act.*" The records of congressional proceedings reveal that in the early stages of the legislation, Congress gave the President authority to curtail the life of the Commission (not the term of office of the members)[33]. When it realized the full scope of the duties, obligations and responsibilities granted to the Commission, it fixed a definite time for the completion of the program and eliminated all reference to Presidential authority to terminate the Commission's work. There is the presumption that Congress, by eliminating a provision contained in an earlier draft of legislation from the final version, intended to exclude such grant or subject matter. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U.S. 184, 198.

In the case of the War Claims Commission, the Congress appreciated that the character of the duties and functions it had delegated to that agency were quasi-legislative and quasi-judicial fixed a time when the term shall expire and did not expressly grant to the President the power to remove at either his pleasure or for the reason stated in his letter of December 10, 1953. In the *Humphrey case* the Court reasoned that since the President had no illimitable power of removal in the case of officers performing quasi-legislative or quasi-judicial functions, they could be dismissed by the President *only* for the causes set forth in the law and that there was implicit for such agencies a prohibition against dismissal for any other causes. If there-

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[33] House Report No. 976, 80th Cong. 1st sess., House Report 1742, 80th Cong. 2nd sess., H.R. 873, 1000, 1823 80th Cong. 1st sess., H.R. 4044, 80th Cong. 2nd sess.

fore the intent of Congress to prohibit removal for causes other than those provided in the statute was inferred by the Court not only from the language of that law, but also by analysis of the character of its function, the same inference can properly be made for the War Claims Commission. Its act provided *no* cause for removal and its functions were quasi-legislative and quasi-judicial. It certainly should not be concluded that an act which does not enumerate any causes for removal gives the President wider latitude (and authority to remove at his pleasure) than he has under an act which lists specific causes.

To hold that the members of the War Claims Commission served at the will and pleasure of the President would "be to thwart in a large measure the very ends which Congress sought to realize by definitely fixing the expiration of the term of office"; would render meaningless the detailed language used by Congress regarding the expiration of the term and life of the Commission and its insistence that the work be completed "at the earliest practicable time after the expiration of the time for filing," do violence to the Congressional interest and concern implicit in the creation of independent commissions, i.e., "to have * * * a body of experts who shall gain experience by length of service; * * * which shall be independent of executive control except in its *selection* and free to exercise its judgment without the leave or hindrance of any other official or any department of government" and which affords to the Congress the aid and assistance it desired in the performance of its traditional functions. The conclusion that the Act provided a fixed term not subject to curtailment by the President, we think, is inescapable from an analysis of the language of the Act, the character of the Commission and its functions as drawn from the statute as a whole, its comparison to the Federal Trade Commission, Interstate Commerce Commission and similar agencies and the conduct of Congress in writing the Act and dealing with the President's nominees to succeed the petitioner on the War Claims Commission.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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